EDITOR'S NOTE

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No. 92-1949

In The Supreme Court of the United States

October Term, 1993

Robert L. Davis, petitioner

v.

United States of America, respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF OF PETITIONER

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QUESTION PRESENTED

When a suspect makes an ambiguous request for counsel during a custodial interrogation, must the interrogator cease questioning until the suspect is provided with counsel?

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OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993), is attached to the Appendix to the Petition For A Writ of *Certiorari* at pages 1a-11a. The unpublished opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Davis*, No 89-2569 (N.M.C.M.R. Sept. 16, 1991) appears at pages 12a-15a of the Appendix to the *Certiorari* Petition.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 11, 1993. The *Certiorari* Petition was filed on June 8, 1993. This Court has jurisdiction to review the decision of the Court of Military Appeals pursuant to 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of the law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

STATEMENT OF THE CASE

Seaman Apprentice Keith Shackleton was found dead behind the commissary at Charleston Naval Base at 5:30 a.m. on October 3, 1988. Joint Appendix (J.A.) 12; Transcript (Tr.) 116. Shackleton was last seen alive playing pool at the Charleston Naval Base Enlisted Club[1] on the evening of October 2. He died of head injuries inflicted by a blunt object which, according to the trial testimony of a pathologist, could have been a pool cue. J.A. 56; Tr. 156. Naval Investigative Service ("NIS") Agents assumed responsibility for the ensuing investigation.

On October 18, 1988, NIS Special Agent Sentell interviewed two sailors who reported that Petitioner, Operations Specialist Seaman Apprentice Robert L. Davis, was in the Enlisted Club on the night of October 2 until closing. J.A. 65; Tr. 163. The Agents learned that only personally-owned pool cues could be removed from the Enlisted Club, J.A. 14; Tr. 118, and the investigation began to focus on persons who owned their own pool cues. J.A. 56; Tr. 156. The NIS Agents knew that Petitioner owned his own pool cue. J.A. 59, 60; Tr. 156, 159, 162.

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[1] As at most naval bases, the Charleston Naval Base has separate clubs for junior enlisted personnel, for chief petty officers and for officers.

On October 19, NIS Agents boarded the U.S.S. MAHAN (DDG-42), the guided missile destroyer to which Petitioner was attached. The NIS Agents intended to interview him, but he was then an unauthorized absentee. J.A. 43; Tr. 141.[2] On October 20, the NIS Agents were informed that Petitioner had returned, and they came back to the ship. The command informed the NIS Agents that Petitioner had been ordered to submit to a psychiatric evaluation, which would commence on October 21, because of concerns about his "mental stability." J.A. 102; Tr. 197, 207-08, 215-16, 220. These concerns stemmed from Petitioner's statements to his Division Officer regarding his "wanting to shoot somebody" and "[b]etter yet, a police officer or a cop of [*sic*] something like that because I know he would kill me." J.A. 19, 24, 67; Tr. 122, 126, 165, 207, 215-16, 220, 222, 223; Appellate Exhibit (App. Ex.) 33.[3] Petitioner's command considered him a suspect in the Shackleton murder investigation, and the NIS Agents knew this. J.A. 48-49; Tr. 146. NIS Agent Clark, however, testified that he considered Petitioner's statements about shooting someone and killing a police officer irrelevant because "we were not looking at a victim of a shooting." J.A. 35; Tr. 135.

The NIS Agents also obtained Petitioner's service records, J.A. 103; Tr. 198, which reflected that Petitioner was an unauthorized absentee on the morning after the murder. J.A. 23, 104; Tr. 125, 207, 215-16. One of the NIS Agents admitted that any unauthorized absentee would have been a target of the investigation. J.A. 107; Tr. 201. In addition, prior to interrogating Petitioner, the NIS Agents were directed to a Petty Officer Guidry, who worked with Petitioner, because Guidry had information that was pertinent to the investigation. J.A. 102; Tr. 197. According to Guidry, Peti-

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[2] Unauthorized absence ("UA"), also referred to as absence without leave ("AWOL"), is a crime under Article 86 of the Uniform Code of Military Justice ("UCMJ"). 10 U.S.C. § 886.

[3] There is nothing in the record to suggest that Petitioner even owned a gun, much less shot anyone.

tioner had stated that Shackleton had been "beaten up and stuck with a pool cue." J.A. 20, 21, 43, 45, 56, 58, 70-71; Tr. 269-79; 123, 124, 141, 143, 155, 157, 167-68, 236. Since the cause of Shackleton's death was not common knowledge, J.A. 23; Tr. 125, NIS Agents regarded this statement as "intimate information regarding the manner of death." J.A. 26, 59; Tr. 127, 158.

On October 20, Petitioner was restricted[4] to his ship because of his prior unauthorized absence. J.A. 16; Tr. 119. Petitioner was escorted to the Admiral's Stateroom,[5] J.A. 13, 66; Tr. 117, 163, aboard the MAHAN by Petty Officer Smith, a Master-At-Arms.[6] J.A. 27, 67; Tr. 128, 164. Smith told the NIS Agents that Petitioner had stated "that he didn't kill [Shackleton], but he knew who did and he wasn't going to tell unless it look[ed] like he was going to get blamed for the death." J.A. 67, 68; Tr. 164, 165. Although this statement suggested that Petitioner feared that he might be "blamed" for the murder, the NIS Agents still gave no warnings to Petitioner nor did they pursue these comments.

By this point, the NIS Agents knew that Petitioner had been in the Enlisted Club on the night of the murder, had played pool, and

[4] "Restriction" is an authorized military punishment generally imposed for minor disciplinary infractions. In this case, it was initially used in lieu of pretrial confinement pending disciplinary action for his recent unauthorized absence. Here, this meant that Petitioner could not leave the ship.

[5] This was a particularly intimidating setting for an "interview" of a low ranking enlisted man such as Petitioner. From the perspective of a young sailor, it would have further reinforced the authority of the NIS Agents, who must have been working closely with the ship's command to have use of the Admiral's Stateroom for this interrogation.

[6] A Master-At-Arms is the naval equivalent of a military policeman. Petitioner was in custody because a reasonable sailor would not have felt free to leave while being escorted in this manner. *See United States v. Scott*, 22 M.J. 297, 302 (C.M.A. 1986). *See also United States v. Tempia*, 16 C.M.A. 629, 636, 37 C.M.R. 249, 256 (C.M.A. 1967) ("It ignores the realities of that situation to say that one ordered to appear for interrogation has not been significantly deprived of his freedom of actions.").

was one of only four people in the Club that night who owned his own pool cue. The Agents further knew that Petitioner had been an unauthorized absentee on the morning after the murder, and had made statements generally about killing and also about the specific manner of Shackleton's death. Notwithstanding all of this information, the NIS Agents informed the command that Petitioner was only "a possible witness," J.A. 42; Tr. 141, and Petitioner was not advised of his *Miranda* or Article 31(b) rights.[7] J.A. 13; Tr. 117.

During the course of the thirty minute investigative "interview" in the Admiral's stateroom, Petitioner admitted that he was at the Club on the evening of October 2 and that he believed he had played pool that evening with Shackleton. J.A. 165; App. Ex. XXVI. Petitioner also said that he "had heard that the guy was beaten with a pool stick from Bonnie and Wade—Bonnie Krusen and Wade Bielby." J.A. 68; Tr. 165. *See also* J.A. 38, 68, 78; Tr. 137, 165, 173. Petitioner admitted that he owned two pool cues, which he retrieved from his girlfriend's car at the request of the NIS Agents, who arranged to escort him off the ship to his girlfriend's house,[8] (special arrangements were made with the ship's commanding officer to allow the NIS Agents to escort Petitioner off the ship). J.A. 16; Tr. 119.

When one of the NIS Agents requested that Petitioner relinquish the pool cues, Petitioner pointed to a spot on the pool cue case

[7] Article 31(b), UCMJ, 10 U.S.C. § 831(b), requires that warnings be given to persons who are either in custody or who should reasonably be suspected of a crime when questioned in a manner likely to elicit an incriminating response. Article 31(b), however, does not include any reference to the Fifth Amendment right to counsel, and Petitioner does not seek any relief in this Court on the basis of Article 31(b).

[8] During the course of the entire investigation, the NIS Agents would retrieve pool cues from only four sailors: Jeff Kraiser, Bonnie Krusen, Wade Bielby and Petitioner. J.A. 37; Tr. 136. One of the cue sticks from the other sailors had been retrieved prior to the October 20 interview of Petitioner. J.A. 39, 79-81; Tr. 138, 174-176.

and said it was probably catsup, but that it might also be his blood. J.A. 166; Tr. 796; App. Ex. XXVI. Although the investigation had been proceeding for more than two weeks, Petitioner was only the second sailor whose pool cues the NIS Agents had retrieved, and his was the only pool cue case with a red spot that looked like blood.[9]

On November 1, NIS Agents interviewed a Petty Officer Mull, who worked in the same division aboard the MAHAN as Petitioner. Mull reported that Petitioner supposedly confessed to the murder:

> [Petitioner] said he beat the guy out of $30.00 playing pool and the guy didn't want to pay him the money and they got into some kind of an argument about it. . . . And he said—he wasn't really clear about how they got together outside the club, but later on that night somehow they—they got together outside the club and started fighting. He said that he hit the guy with a pool—his pool stick a couple of time and he said he thought he put one of the guy's eyes out; said it was messed up pretty bad. . . . I don't know exactly how he left the base, on foot or what. He said he went to a girlfriend's house. And he said at this girlfriend's house he burned his clothes in a fireplace.

J.A. 181; Tr. 747.[10] Mull reported that Petitioner had said he had an alibi. J.A. 181; Tr. 747. Mull further claimed that Petitioner

[9] The government was unable to show at trial that the blood found on the pool cue case matched the victim's blood. Tr. 906. Indeed, the government found no blood on the inside of the pool cue case or on the pool cues themselves. Tr. 905-906. Spots of blood were found on Petitioner's tennis shoes and trousers. There was "a tiny red spot" on the right shoe which proved to be blood but there was an insufficient quantity to determine the type. Tr. 911. There was also a "small reddish-brown spot" on Petitioner's jeans which proved to be blood type O, the victim's blood type.

[10] The government's evidence at trial disproved several of the "facts" contained in Mull's statement and to which he later testified. *See infra* at 43.

said he had tried to remove blood from his pool cues, but was unconcerned because he and Shackleton had the same blood type. J.A. 182; Tr. 747. The NIS Agents claimed that they finally began to consider Petitioner a suspect only after hearing Mull's report. J.A. 50; Tr. 147.

On November 4, NIS Agents arrested Petitioner at the Naval Hospital, where he had been held essentially incommunicado in the psychiatric ward since October 28th. Tr. 282. Ironically, it was the husband of the lead NIS Agent, Doctor Sentell, who, as Petitioner's attending physician, had directed that no visitors be allowed to see Petitioner unless first screened by him. App. Ex. LXI.[11] After they handcuffed him at the psychiatric ward, the Agents escorted Petitioner to the NIS office where he was handcuffed to a chair for the duration of the interrogation. J.A. 145; Tr. 319. This time, the NIS Agents elected to advise Petitioner of his Article 31(b) rights and of his *Miranda* rights. Petitioner signed a form acknowledging this advice. J.A. 151; Tr. 323.

At the beginning of the interrogation, the Agents asked Petitioner simply to relate his activities on the night of October 2; Petitioner stated that he had been out that night with his girlfriend, and admitted that he might have played pool at the Enlisted Club. J.A. 175; App. Ex. XL.

The NIS Agents then began to ask Petitioner a series of questions which suggested that his account was inconsistent with statements from other persons. For example, the NIS Agents told Petitioner that his girlfriend had denied being at the Enlisted Club on October 2. Petitioner responded that he must have confused the nights because the events in question had occurred over a month earlier. J.A. 175; App. Ex. XL. The NIS Agents also inquired why Petitioner had told his Division Officer that he had spent the night in Columbia, South Carolina, and not with his girlfriend; Petitioner answered that he did not want to get into trouble for being involved with a married woman. J.A. 175; App. Ex. XL.

[11] Although he had been evaluated as non-homicidal and non-suicidal, Petitioner was considered a murder suspect, was placed under constant watch, and was kept in red pajamas so that he would be visible if he tried to escape. App. Ex. LXI, at p. 3.

The NIS Agents then began to ask questions which implied that Petitioner had murdered Shackleton. They confronted Petitioner with a report that he had won $30 from Shackleton in a game of pool; Petitioner denied this. The Agents then asked how Petitioner would feel if someone who owed him money in a pool game refused to pay. J.A. 175; App. Ex. XL. Petitioner responded that he would not get upset and would forget about it. Finally, the Agents asked Petitioner about the presence of a bloody T-shirt in his locker; Petitioner explained that the blood was the result of the extraction of his wisdom teeth.[12] J.A. 176; App. Ex. XL.

At this point, according to Agent Sentell, Petitioner—who had been kept handcuffed to the chair throughout the entire interrogation—said "[m]aybe I should talk to a lawyer." J.A. 135, 140, 152, 176; Tr. 309, 313, 324, App. Ex. XL.[13] The NIS Agents immediately stopped questioning Petitioner about the murder.

They did not, however, cease questioning him altogether. Instead, when asked if they did anything to "clarify" Petitioner's request, Agent Sentell testified:

> [We] made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, "No, I don't want a lawyer. . . ."

[12] The extraction was confirmed by Petitioner's dentist, Tr. 1260, and dental records, Defense Ex. K. Forensic testing confirmed that Petitioner's blood, type B, and not Shackleton's, type O, was on the shirt. Tr. 1260-61.

[13] Petitioner testified at the suppression hearing to a different sequence of events:

> Well, they were talking to me, and I said "Well, I'd like a lawyer," and they said "we'll take a break," and they walked out and left me handcuffed too the chair, and the older guy came in and stood by the door watching me.

J.A. 146; Tr. 319. Petitioner also testified that, after a short break, "[t]hey came back in and started questioning me again." J.A. 146; Tr. 319.

J.A. 136; Tr. 310.

The NIS Agents took a short break after interrogating Petitioner about his statement regarding a lawyer. J.A. 128-129; Tr. 303-304. Returning to the interrogation room, they gave Petitioner, still handcuffed, a cursory reminder of his rights. They did not repeat the advice in full or seek to have him sign a new form. J.A. 130; Tr. 304-305.

The NIS Agents then asked Petitioner about a number of statements he had made to other persons concerning the murder. The NIS Agents asked Petitioner why he had told Petty Officer Guidry that the man who died behind the commissary had been struck with a pool cue; Petitioner responded that he liked to "mess" with people and make them think that he knew more than he actually did. Tr. 961.[14] When the Agents also asked why Petitioner had said that Shackleton had been "hit and jabbed," Petitioner answered that the added detail made his story sound more realistic. J.A. 176; App. Ex. XL. Petitioner also stated that Petty Officer Bielby had told him the details about the pool cue. In fact, Bielby had admitted this when interviewed by the NIS Agents on October 11. Tr. 242.

Approximately an hour after the initial request for counsel, Petitioner told the NIS Agents that, if he had killed Shackleton, he would have had to tell someone about it. J.A. 176; App. Ex. XL; Tr. 961. When the NIS Agents confronted Petitioner by stating that he *had* told someone, Petitioner immediately said "I think I want a lawyer before I say anything else." J.A. 129; Tr. 304; App. Ex. XL. In contrast to the "ambiguous" statement "[m]aybe I should talk to a lawyer" made an hour earlier, when he said "I think I want a lawyer," the NIS Agents ceased all questioning of Peti-

[14] Other persons would later confirm that Petitioner was a chronic liar, if not delusional. When interviewed by the Agents, one sailor stated that Petitioner was "addicted to lying." J.A. 168; App. Ex. XXIX, at p. 2. Petitioner would later tell the brig chaplain that he had defeated Michael Jordan in basketball, knocked out Muhammad Ali, and had enjoyed sex (presumably with other persons) while in confinement. J.A. 187; Tr. 1555-56.

tioner.[15]

Petitioner moved to suppress the statements taken after the initial request for counsel. The trial court ruled in favor of the government finding that "the mention of a lawyer by the accused during the course of the interrogation . . . [was] not in the form of a request for counsel . . ." under *Miranda* and *United States v. Tempia*, 16 C.M.A. 629, 37 C.M.R. 249 (1967) (*Miranda* applicable to the military). J.A. 164; Tr. 341.[16]

Petitioner was charged with capital murder. The government intended to show that Petitioner had: sodomized[17] or attempted to sodomize the victim; robbed or attempted to rob the victim; and that "the murder was preceded by the intentional infliction of substantial mental and physical pain and suffering to the victim." App. Ex. IX, p. 5; Tr. 75-76. The government's theory was that Petitioner had deliberately murdered Shackleton to rob him of $30 that Shackleton lost gambling with Petitioner, although the government never explained why the murderer-robber left $200 on Shackleton's person. *See* Tr. 562.

The trial judge, however, found the evidence too speculative to permit the government to seek to prove the alleged sodomy. The jury also rejected the government's theory, acquitted Petitioner of robbery, attempted robbery, and premeditated murder, and found Petitioner guilty of unpremeditated murder in violation of Article 118(2), UCMJ 10 U.S.C. § 918. R. 1527. Petitioner was sentenced to life in prison.

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[15] The record affords no explanation of how the brief questioning and short breaks described by the Agents could have taken from 5:53 p.m., J.A. 173; App. Ex. XXVI, at p. 3, when Petitioner made his initial ambiguous request, until 6:57 p.m., J.A. 141, Tr. 314, when Petitioner's second invocation was honored. *See also* J.A. 151; Tr. 324 (indicating that the interrogation concluded at 7:00 p.m.).

[16] The military judge failed to explicitly resolve the *factual* dispute between whether Petitioner actually said "[m]aybe I should talk to a lawyer" or "'I'd like a lawyer. . . .'" *See supra* at 8, n.13.

[17] The charges regarding sodomy and attempted sodomy were based upon the fact that the victim had been found with his trousers unbuttoned and pulled below his hips. Tr. 1282.

On appeal, the Navy-Marine Corps Court of Military Review affirmed the conviction and sentence. Although expressly raised, the Navy-Marine Corps Court of Military Review did not specifically address the *Miranda* issue. On subsequent appeal pursuant to 10 U.S.C. § 867(a)(3), the Court of Military Appeals affirmed Petitioner's conviction, and held that the Agents properly clarified Petitioner's request for counsel before continuing with the interrogation. *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993). Petitioner filed a timely Petition for a Writ of *Certiorari*. *Certiorari* was granted on November 1, 1993.

SUMMARY OF ARGUMENT

Interrogators must cease all questioning when a suspect in custody makes a statement that ordinary people could reasonably understand, in context, as a request for counsel. In holding that Petitioner's statement "[m]aybe I should talk to a lawyer" did not constitute a request for counsel because it was not in the form of an invocation, the lower courts improperly elevated form over substance. Petitioner's statement contained two critical components: an expression that Petitioner (1) desired to communicate with (2) an attorney. Any ambiguity created by the word "maybe" is dispelled when viewed in the context presented here: a custodial interrogation of a low ranking sailor from a combat vessel in the United States Navy who was handcuffed and interrogated following two weeks of isolation in a psychiatric ward. In these circumstances, Petitioner's statement "[m]aybe I should talk to a lawyer" was not functionally different from his later statement "I think I want a lawyer," which the NIS Agents understood as an invocation of the right to counsel.

Since ordinary persons are not expected to understand the exact nature of their rights, they cannot be expected to invoke those rights with the precision of lawyers and judges. Moreover, the inherently coercive nature of custodial interrogation requires a low threshold for a statement to qualify as a request for counsel.

Such an approach is also consistent with the settled principle that courts should give a broad, rather than a narrow, interpretation to requests for counsel. While Petitioner's statement was ambiguous if divorced from its context, it should reasonably have been understood as a request for counsel under the circumstances, and all questioning should have ceased. Further, the trial court erred in allowing the jury to consider Petitioner's post-invocation statements, which were obtained following improper efforts to "clarify" the request, as evidence that Petitioner's "confession" to Mull was reliable. *Smith v. Illinois*, 469 U.S. 91 (1984).

Even if an ambiguous request were not sufficient to trigger the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), the police should be prohibited from clarifying any ambiguity. Equivocation in a request for counsel may more often reflect a suspect's timidity in the face of the pressures of custodial interrogation than vascillation between invocation and waiver. The police should not be permitted to "clarify" any such ambiguities because the potential for abuse and overreaching is too great. The interrogators have no incentive to aid a suspect in invoking the right to counsel, nor do they represent the suspect's interests as only a lawyer can. Allowing the police to postpone providing an attorney after an ambiguous request only reinforces the coercive atmosphere that necessitated the *Miranda* and *Edwards* decisions in the first place. Any interrogation subsequent to requests for counsel—be they forthright or ambiguous—is likely to be seen by a suspect as further evidence that the police control access to counsel and may deny the request. Against this backdrop, a bright line rule prohibiting "clarification" is necessary.

A rule prohibiting police "clarification" of ambiguous requests for counsel also has the salutary effect of accommodating the individual characteristics of suspects. Where police are unaware of a suspect's susceptibility to certain suggestions, even officers more solicitous of a suspect's rights may unwittingly dissuade a suspect from invoking the right to counsel when "clarifying" the request. A bright line rule has the advantage of protecting suspects from not only deliberate but also unintentional abuse of the coercion inherent in custodial interrogation.

Even if the police were permitted to engage in a limited inquiry designed only to clarify an ambiguous request, Petitioner is still entitled to a new trial. The NIS Agents did more than merely clarify his request. The Agents used misdirection and made misleading statements. Thus, the government is unable to show that Petitioner's post-invocation statements followed a knowing and voluntary waiver. At a minimum, the interrogators' conduct here was inappropriate, and shows the continued need for the strict application of *Miranda*.

ARGUMENT

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court held that the government may not introduce, in its case-in-chief, statements obtained from a suspect in custody unless it shows a knowing and voluntary waiver of Fifth Amendment rights following appropriate advice and warnings. *Id.* This rule was necessary given both the inherently coercive nature of custodial interrogation, and the risk that an ordinary person might otherwise be unaware of his or her Fifth Amendment rights. The Court created an irrebuttable presumption that, in the absence of proper warnings, a suspect's waiver was deemed not to be a knowing and voluntary waiver of Fifth Amendment rights. *Id.* at 468-69.

Consistent with the government's burden of proving a knowing and voluntary waiver and with the presumption against the waiver of fundamental constitutional rights, 384 U.S. at 475, the Court in *Miranda* did not require that a request for counsel be clear and unequivocal: "[i]f, however, [the suspect] *indicates in any manner and at any stage of the process* that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444-445 (emphasis added). *See also id.* at 473-74 ("[i]f the individual *indicates in any manner*, at any time, prior to or during questioning, that he wished to remain silent, the interrogation must cease.") (emphasis added); *id.* at 445 ("if the individual is alone

and *indicates in any manner* that he does not wish to be interrogated, the police may not question him."); *id.* at 500 (emphasis added) ("When at any point during an interrogation the accused seeks affirmatively or *impliedly* to invoke his rights to silence or counsel, interrogation must be foregone or postponed.") (Clark, J., concurring in part and dissenting) (emphasis added).

The use of the phrase "in any manner" reflected that the standard for determining whether a suspect has invoked the right to remain silent or the right to counsel was broad and inclusive, not requiring the use of "magic words," so that lay persons could enjoy the benefit of the right conferred by *Miranda*. 384 U.S. at 444, 473-74. Use of the word "indicates" also underscored the low threshold of clarity required to invoke the Fifth Amendment rights. *Cf. Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. ___, ___, 113 S. Ct. 716, 720 (1993) (use of "indicates" in Dictionary Act, 1 U.S.C. § 1, imposes less of a burden for conveying sentiment than other terms that were not used). The low standard reflected the fundamental premise of *Miranda*: the coercive nature of custodial interrogation required safeguards.

Subsequent decisions of the Court have, in *dicta*, characterized as clear and unequivocal various requests for counsel which, when viewed out of context, appear somewhat ambiguous. For example, in *Smith*, this Court held that the suspect's response "Uh, yeah. I'd like to do that" after being asked whether he understood his right to consult with a lawyer and to have one present was a clear and unequivocal request requiring interrogation to cease. 469 U.S. at 96-97. The Court went on to hold that subsequent statements could not be used to cast doubt on a suspect's initial request. *Id.* at 97-99.

Likewise, in *Edwards*, the Court held that a suspect who had stated "I want an attorney before making a deal" had "clearly asserted his right to counsel" and that it was "inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused" after the invocation of the right to

counsel. 451 U.S. at 485.[18] Although the Court in *Edwards* and *Smith* found that the statements made by the defendants in those cases were clear and unequivocal, those decisions did not change the legal standard for invocations that had originally been established in *Miranda*.

The Court has reemphasized that it is unnecessary for a suspect to choose his words with lawyer-like precision when invoking his right to counsel, for "[i]nterpretation is only required where the defendant's words, *understood as ordinary people would understand them*, are ambiguous." *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) (emphasis added). *See also McNeil v. Wisconsin*, 501 U.S. ___, ___, 111 S. Ct. 2204, 2209 (1991) (*Edwards* "requires, at a minimum, some statement that can reasonably be construed to be expression of a desire for the assistance of an attorney"); *Minnick v. Mississippi*, 498 U.S. 146, 165 (1990) (noting that "if [a suspect] should say, more tentatively, 'I do not think I should discuss this matter further without my attorney present' he can no longer be approached") (Scalia, J., dissenting).

Pending before the Court is the issue of whether a suspect undergoing custodial interrogation must express his desire to communicate with an attorney in a clear and unequivocal form to invoke his right to counsel under the Fifth Amendment.

A. Petitioner's Statement "Maybe I Should Talk To A Lawyer" Was Sufficient To Invoke The Right To Counsel.

Although ambiguous in the abstract, Petitioner's statement "[m]aybe[19] I should talk to a lawyer," when examined in the

[18] In *Edwards*, the Court recognized that a defendant's request for an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly. *Michigan v. Jackson*, 475 U.S. 625, 633 n.7 (1986). Consequently, until the defendant is in fact provided with counsel, all questioning must cease.

[19] On its face, without reference to context, the word "maybe" reflects some ambiguity. For example, the Webster's Ninth New Collegiate Dictio-

context in which the statement was made, would be understood by ordinary people as a request for counsel. Accordingly, Petitioner expressed his desire to consult with an attorney with clarity sufficient to invoke the right to counsel under *Miranda*.

1. Ordinary People Cannot Be Expected To Speak With Precision.

It is unreasonable to expect ordinary persons to speak in clear and unequivocal terms, especially in the context of a custodial interrogation. This Court has already recognized that ordinary citizens should not be expected to fully comprehend the precise nature of their constitutional rights:

> We also agree with the comments of the Michigan Supreme Court about the nature of an accused's request for counsel:
>
> > Although judges and lawyers may understand and appreciate the subtle distinctions between Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel.

Michigan v. Jackson, 475 U.S. 625, 633 n.7 (1986) (citation omitted). Indeed, in *Miranda*, the Court stressed the need to advise a suspect of his rights in language that ordinary citizens

nary (1991) defines the adverb "maybe" as meaning "perhaps." *Id.* at 735. The adverb "perhaps" is, in turn, defined as meaning "possibly but not certainly." *Id.* at 873. Here, the trial judge made no factual findings as to Petitioner's actual intent. For example, there is no finding that Petitioner stressed one word ('maybe I *should* talk to a lawyer') rather than another ('*maybe* I should talk to a lawyer'). Instead, the court ruled that Petitioner's statement was not, as a matter of law, an invocation.

would be able to understand: "[t]he warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present." 384 U.S. at 473.

It would be unreasonable to require those same ordinary citizens who need plain language explanations to invoke these rights with the precise language of lawyers. *See Robinson v. Borg*, 918 F.2d 1387, 1393 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 118 (1991) ("a suspect is required neither to use any magical formulation to invoke his rights nor to express his desire to obtain counsel with lawyer-like precision."). Doing so would effectively deny the right to large segments of the populace. For example, suspects not fluent in English may be unable to invoke their right to counsel. *See United States v. De La Jara*, 973 F.2d 746, 750 (9th Cir. 1992) (where suspect's request for counsel was in Spanish, "court interpreter noted that [suspect's] statement to the interrogating officer . . . could be either a question or assertion depending on inflection, and that the meaning would turn to some extent on the context"). Likewise, certain minority and ethnic groups whose speech patterns tend to avoid direct assertions or confrontations may be effectively deprived of the Fifth Amendment right to counsel if required to invoke it in clear and unequivocal terms. *See* Janet E. Ainsworth, *In A Different Register: The Pragmatics Of Powerlessness In Police Interrogation*, 103 Yale L.J. 1, 61 (1993).

Requiring a suspect to invoke the right to counsel in clear and unequivocal terms also overlooks the reality that everyday speech is imprecise. Outside of courtrooms and briefs, common speech is replete with terms used to soften the impact of direct assertions. Indeed, common language patterns often contain mollifying terms, but use of such qualifying language does not necessarily reflect equivocation on the speaker's part.[20] Even in the courtroom, a

[20] One commentator has suggested that women and some minorities are particularly conditioned to qualify their speech so as not to be perceived as

statement may appear ambiguous when viewed in isolation when it was clear in context. For example, taken out of context, the statement "[c]ould I trouble you to, please, go and obtain those notes" would likely be seen as a polite question. Once it is disclosed, however, that the statement was made by the trial judge to a law enforcement officer at the suppression hearing in this case, the statement is obviously understood, as it was even by the NIS Agents here, as an order.[21] J.A. 18; Tr. 121. In sum, context makes all the difference. Any standard that would require lay persons to speak with clarity sufficient to convey meaning when the words are later divorced from their context would be unworkable in the real world.

The government, however, advances a rule that would require individuals to invoke the Fifth Amendment right with a clarity and precision seldom found in everyday speech. Falling short of such clarity, the government would permit police officers, who have an incentive to discourage suspects from exercising their Fifth Amendment rights, to "clarify" any ambiguity that the police are able to read into suspects' requests for counsel. This would effectively destroy the *Edwards* rule. Police might be tempted to unearth some ambiguity in the invocations of suspects, which would be easy to do except where a legally-trained suspect declares "I hereby invoke my right to counsel under the Fifth Amendment as construed in *Miranda v. Arizona*." Such a rule would result in unequal treatment based solely on a suspect's eloquence, educa-

overly aggressive or assertive, or too masculine. Ainsworth, *In A Different Register*, 103 Yale L.J. at 18.

[21] It is not difficult to envision other examples where context clarifies statements that might appear ambiguous when considered in isolation. For example, if an employee seeks a raise by telling his or her employer that "maybe I want a raise," the employer has no need to clarify the request to understand that the employee has, in fact, asked for a raise. If the employer responds, "well, maybe I think that if you want more money, you should look for another job," the employee understands that there will be no raise.

tion, or sophistication, characteristics wholly unrelated to a suspect's right to invoke the Fifth Amendment.

The Court has consistently emphasized that it is unnecessary for a suspect to choose his words with lawyer-like precision when invoking his right to counsel, for "[i]nterpretation is only required where the defendant's words, *understood as ordinary people would understand them*, are ambiguous." *Barrett*, 479 U.S. at 529 (emphasis added). *See also McNeil*, 501 U.S. at ___, 111 S. Ct. at 2209; *Minnick*, 498 U.S. at 165 (Scalia, J., dissenting); *Smith*, 469 U.S. at 101 (noting that "statements are rarely that clear; differences between certainty and hesitancy may well turn on the inflection with which words are spoken, especially where, as here, a seven-word statement is isolated from the statements surrounding it") (Rehnquist, J., dissenting).

Similarly, an implicit waiver of *Miranda* rights may suffice because the "question is not one of form." *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). In *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), a plurality of the Court held that a suspect's "ambiguous" question "[w]ell, what is going to happen to me now?" was sufficient to reinitiate a dialogue with the police officers. *Id.* at 1045-46 (plurality opinion). The plurality articulated an objective test that focused on how the statements "*could* reasonably have been interpreted" by the people to whom they were directed. 462 U.S. at 1046 (plurality opinion) (emphasis added).[22] Since ambiguity in a suspect's statement is given a broad interpretation in deciding whether he or she has waived the *Miranda* rights or reinitiated interrogation, the same broad interpretation must be given to a suspect's "ambiguous" request for counsel.

Petitioner was likely to have understood the warnings he received as any other ordinary person would have: he had a right to a lawyer, but was given no notice that the right could only be

[22] The dissent in *Bradshaw* apparently agreed with the standard articulated by the plurality, and disagreed only with the plurality's application of the standard to the facts in that case. 462 U.S. at 1055 (Marshall, J., dissenting).

invoked by a clear and unequivocal request. Having instructed Petitioner that he "ha[d] the right to have [his] retained civilian lawyer and/or appointed military lawyer present during this interview," J.A. 170; App. Ex. XXXVII, the government now seeks to add a gloss not at all apparent to the ordinary persons whose waivers of constitutional rights *Miranda* sought to protect. The government's position, essentially, is that the warning Petitioner received carried an unspoken proviso that he had the right to have his retained civilian lawyer and/or appointed military lawyer present during this interview, *but only if he asked for an attorney in clear and unequivocal terms.*

It would be fundamentally unfair to now inform Petitioner that he failed to satisfy a requirement of which he was unaware while subject to the pressures inherent in custodial interrogation. *See Rhode Island v. Innis*, 446 U.S. 291, 310 (1980) ("In order to perform that function effectively, the warnings must be viewed by both the police and the suspect as a correct and binding statement of their respective rights.") (Stevens, J., dissenting).

Indeed, the warnings themselves are likely responsible for any ambiguity in Petitioner's request for counsel. The warnings given to Petitioner did not explain that a request for counsel itself could not be used against him. Petitioner may have selected the term "maybe" because he thought that requesting a lawyer was tantamount to an admission of guilt. Since there is a reasonable likelihood that the government's own instructions were the cause of any ambiguity in Petitioner's request for counsel, it is only appropriate that the government, rather than Petitioner, should bear the responsibility of any consequences of this ambiguity.

The notion that legal standards must contemplate the ordinary people to whom they apply is hardly unique to *Miranda*. In other contexts, this Court has recognized that the proper inquiry does not focus on what appellate judges would understand; rather, the proper standard must contemplate what ordinary people, who are not schooled in the technicalities of the law, would understand.

For example, in reviewing the specificity of search warrants, this Court has stressed that the affidavits supporting warrants "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." *United States v. Ventresca*, 380 U.S. 102, 108 (1965). Thus, "[t]he rigorous inquiry into the *Spinelli* prongs and the complex superstructure of evidentiary and analytical rules . . . cannot be reconciled with the fact that many warrants are—quite properly—issued on the basis of nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings." *Illinois v. Gates*, 462 U.S. 213, 235-36 (1983) (citation omitted).

If police officers, who presumably receive training as to the content and meaning of the Fourth Amendment, are permitted wide latitude in expressing themselves, it must logically follow that a suspect, likely unaware of the intricacies of the Fifth Amendment and in the inherently coercive setting of a custodial interrogation, should be afforded the same latitude in expressing his or her desire to consult with an attorney.[23]

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[23] Similarly, in reviewing whether jury instructions were sufficiently clear to convey the legal criteria to be applied, the Court has looked to whether there is a "reasonable likelihood" that the jurors misunderstood the standard they were to apply. *Boyde v. California*, 494 U.S. 370, 380 (1990). *See also Estelle v. McGuire*, 502 U.S. ___, ___ & n.4, 112 S. Ct. 475, 482 & n.4 (1991). Commentators and courts have also stressed the importance of viewing jury instructions from the perspective of the ordinary citizen who sits as a juror:

> The use of legal terminology in instructions should be avoided as much as possible. In preparing instructions, we should remember that the task is to shed light and not to add to the darkness. . . . [T]o the extent possible, we should use that which Chief Judge Alfred Murrah calls the common speech of man.

Edward J. Devitt, *Ten Practical Suggestions About Federal Jury Instructions*, 38 F.R.D. 75, 76-77 (1965). *See also Downie v. Powers*, 193 F.2d

In this same vein, this Court has held that, because *habeas* petitioners "are often unlearned in the law and unfamiliar with the complicated rules of pleading," courts may not "impose on them the same high standards of the legal art which we might place on members of the legal profession." *Price v. Johnston*, 334 U.S. 266, 292 (1948).[24] At the very least, a suspect who is in the heat of a custodial interrogation must be extended the same latitude of expression.

Ordinary people would consider Petitioner's statement "[m]aybe I should talk to a lawyer" in its context, as should this Court. In its custodial setting, Petitioner's request was sufficiently clear to invoke his Fifth Amendment right to counsel. Petitioner did not merely make a reference to an attorney. *See Barrett*, 479 U.S. at 526-27. Instead, while handcuffed to a chair, Petitioner conveyed a desire to "talk" to an attorney. Although not every reference to an attorney by a suspect in custody requires that questioning cease, *cf. Barrett*, 479 U.S. at 525, Petitioner's statement was not so nebulous. Where the suspect's statement does not qualify or condition his expressed desire to speak to an attorney, all questioning must stop. *Edwards*, 451 U.S. at 484-85.

The conduct of the NIS Agents further confirms that they understood Petitioner's statement as a request for counsel, since they immediately changed the emphasis of their inquiry to a supposed effort to "clarify" the request. Petitioner's second request for counsel, which the NIS Agents elected to honor, was not meaningfully different from the first request. *Compare* J.A. 129; Tr. 304 ("*[m]aybe* I should talk to a lawyer") (emphasis added) *with* J.A. 137; Tr. 310 ("*I think* I want a lawyer before I say anything else.") (emphasis added).[25] The only distinction between the two requests for counsel was that, after the second request, the NIS Agents concluded that they would elicit no more inculpatory statements from Petitioner. Accordingly, the NIS Agents elected to honor Petitioner's second "unambiguous" request for counsel. Of course, under the government's theory, the Agents would have been free to continue the interrogation after "clarifying" the "ambiguity" reflected in the words "I think."

760, 767 (10th Cir. 1951) ("[jury instructions] should be . . . given . . . in the 'common speech of man', so that the laymen to be guided thereby, will have an intelligent understanding of their true meaning.")

[24] This Court has admonished the courts of appeals that they should "liberally construe" the requirements for a notice of appeal. *Smith v. Barry*, 502 U.S. ___, ___, 112 S. Ct. 678, 681 (1992). A more stringent standard cannot apply to requests for counsel made by suspects in custody.

2. Any Ambiguity In A Suspect's Request For Counsel Must Be Resolved In Favor Of The Constitutional Right.

This Court has already rejected the argument that any ambiguity in a suspect's request for counsel must be resolved against the suspect. In *Michigan v. Jackson*, the State argued that a defendant's request for counsel at his arraignment, where the request did not unequivocally demand the presence of counsel at any subsequent interrogation, should not be considered to be a request for representation during any further interrogation by police. 475 U.S. at 632-33. This Court rejected the argument:

> This argument, however, must be considered against the backdrop of our standard for assessing waivers of constitutional rights. Almost a century ago, in *Johnson v. Zerbst*, 304 U.S. 458 (1938), a case involving an alleged waiver of a defendant's Sixth Amendment right to counsel, the Court explained that we should "in-

[26] In sharp contrast to the lower courts and the NIS Agents here, most courts that have considered the question have concluded that a suspect's use of the word "maybe" does not infuse ambiguity into a request for counsel. *E.g., Maglio v. Jago*, 580 F.2d 202, 203, 205 (6th Cir. 1978); *United States v. Prestigiacomo*, 504 F. Supp. 681, 683 (E.D.N.Y. 1981); *People v. Munoz*, 83 Cal. App. 3d 993, 995-96, 148 Cal.Rptr. 165, 165-66 (Cal. Ct. App. 1978); *Commonwealth v. Santiago*, 405 Pa. Super. 56, 69, n.11, 591 A.2d 1095, 1101 n.11, 1102, *appeal denied*, 529 Pa. 633, 600 A.2d 953 (1991).

> dulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.*, at 464. For that reason, it is the State that has the burden of establishing a valid waiver. *Brewer v. Williams*, 430 U.S., at 404. Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel. . . .

475 U.S. at 633.

Although the question presented in *Jackson* concerned the waiver of a defendant's Sixth Amendment right to counsel rather than whether a suspect had invoked the Fifth Amendment right to counsel under *Miranda*, the same analysis must apply because *Miranda* and *Jackson* rest on the same constitutional bases. As in *Jackson*, this Court in *Miranda* emphasized the same high standard for waiver that was first applied in *Johnson v. Zerbst*, 304 U.S. 458 (1938). 384 U.S. at 475. *See also id.* at 445. Just as the application of the high standard for waiver in *Jackson* led to the conclusion that any ambiguity demonstrated that there had been no waiver, the same reasoning must apply to a request for counsel in the Fifth Amendment context, because the Fifth Amendment right to counsel exists to protect against unknowing waivers of the privilege against self incrimination.

B. The Interrogators May Not Clarify Any Ambiguity In A Suspect's Expressed Desire To Consult With Counsel.

When confronting a suspect who expresses a desire for counsel, interrogators are required under *Miranda* to cease all questioning. *Edwards*, 451 U.S. at 474-85. This must also be the rule in cases where the request may appear to be ambiguous. *Jackson*, 475 U.S. at 632-33. Under *Edwards*, a suspect whose request conveys that he or she is unable to cope with the pressures of custodial interrogation without the presence of counsel must be provided with counsel. It follows that a suspect who is ambiguous in expressing whether he or she wishes to consult an attorney is even less well-equipped to withstand the pressures of custodial interrogation alone.

Where a suspect is unable even to decide whether he or she needs an attorney, the interrogators may not be entrusted with the responsibility to "clarify" the ambiguity. They have no incentive to do so. Since the police do not represent the interests of the suspect, the risk of coercion and prejudice to a suspect's rights are sufficiently great that prohibiting such "clarification" is warranted as a prophylactic measure. Indeed, to allow the police not to honor an ambiguous request for counsel only adds to the coercive atmosphere. *See Minnick*, 498 U.S. at 162 (Scalia, J., dissenting). Granting the interrogators a license to "clarify" an ambiguous request for counsel would simply appoint the fox to guard the henhouse.

1. A Bright Line Rule Is Necessary Because The Interrogators Have An Incentive To Prevent A Suspect From Making A Knowing And Voluntary Waiver Of His Fifth Amendment Right To Counsel.

The Fifth Amendment right to counsel is founded "on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." *Fare v. Michael C.*, 442 U.S. 707, 719 (1979). This Court further noted that "the lawyer's presence helps guard against overreaching by the police. . . ." *Id.* Consequently, the Court ruled that a juvenile's request for the presence of a probation officer could not be considered as a request for counsel because the probation officer could not be expected to provide independent advice to a suspect in the way a lawyer would:

> In these circumstances, it cannot be said that the probation officer is able to offer the type of independent

> advice that an accused would expect from a lawyer retained or assigned to assist him during questioning. Indeed, the probation officer's duty to his employer in many, if not most, cases would conflict sharply with the interests of the [suspect]. For where an attorney might well advise his client to remain silent in the face of interrogation by the police, and in doing so would be "exercising [his] good professional judgment . . . to protect to the extent of his ability the rights of his client," *Miranda v. Arizona*, 384 U.S., at 480-481, a probation officer would be bound to advise his charge to cooperate with the police.

442 U.S. at 721. *See also Oregon v. Elstad*, 470 U.S. 298, 316 (1985) ("[p]olice officers are ill-equipped to pinch-hit for counsel, construing the murky and difficult questions" arising under *Miranda*).

The natural goal of interrogators seeking to "clarify" any supposed "ambiguity" surrounding a suspect's request for counsel is to persuade the suspect not to assert the right to counsel, or to override the timid suspect who invokes the right in sheepish fashion.[26] It was precisely this potential for abuse and "overreaching" that necessitated the prophylactic rule enunciated in *Miranda*. *Smith*, 469 U.S. at 99 n.8. *Miranda* stressed that the warning "may serve to make the individual acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." 384 U.S. at 469. To allow such persons to advise a suspect whether to request counsel, under the guise of clarifying whether the suspect had invoked that right, would be inconsistent with the very purpose of

[26] As Justice Jackson observed years ago in the context of considering Fourth Amendment claims, the courts must recognize that police are involved in the "often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Miranda and *Edwards*.[27]

In applying *Miranda*, the Court has declined to engage in any fact-specific inquiry as to whether the police had, in any particular case, actually tricked or otherwise misled the suspect into confessing. *Berkemer v. McCarthy*, 468 U.S. 420 (1984). Rather, the mere potential for such coercive psychological pressure is determinative:

> The purposes of the safeguards prescribed by *Miranda* are to *ensure* that the police do not coerce or trick captive suspects into confessing, to relieve the " 'inherently compelling pressures' " generated by the custodial setting itself, " 'which work to undermine the individual's will to resist,' " and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions are voluntary. Those purposes are implicated as much by in-custody questioning of persons suspected of misdemeanors as they are by questioning of persons suspected of felonies.

[27] The conflicting interests of the interrogator and the suspect are particularly significant in considering whether the police should be permitted to clarify an ambiguous request for counsel. As a practical matter, when police clarify a request for counsel, they are no longer simply reading the *Miranda* warnings. Rather, from the perspective of the suspect, they are likely to be advising a suspect as to whether the suspect should or should not waive the right to remain silent and the concomitant right to counsel. Because of the conflict, however, the courts should not be required to conduct a case-by-case inquiry into the sufficiency of such advice. The incentive of the police officer is likely to affect not only the words but also the manner in which any ambiguity is clarified. Thus, prejudice should be presumed. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980) (once defendant makes showing that counsel had actual conflict of interest, prejudice is presumed and courts will not engage in case-specific review for actual prejudice because of the likelihood that the conflict affected the representation).

Id. at 433 (emphasis in original) (footnotes omitted). Since this rationale regarding the mere potential of coercive psychological pressures applies to persons arrested for misdemeanor traffic violations, the same must apply to Petitioner, a murder suspect who was in custody for several weeks before being shackled to a chair and interrogated.

Any rule permitting the interrogators to clarify ambiguity surrounding a suspect's request for counsel would encourage precisely the same sort of badgering of a defendant into waiving his rights that the *Edwards* bright line test was designed to prevent. *See Michigan v. Harvey*, 494 U.S. 344, 350 (1990). Likewise, applying these principles to a suspect's request for counsel which was no more articulate than Petitioner's, this Court held in *Smith v. Illinois* that "[u]sing an accused's subsequent responses to cast doubt on the adequacy of the initial request *itself* is even more intolerable." 469 U.S. at 98-99 (emphasis in original).[28]

Clever police officers will often be able to inject ambiguity where none exists. For example, had the police officers in *Edwards* been permitted to "clarify" Edwards' statement that "I want an attorney before making a deal," a statement that the Court considered "a sufficient invocation of his *Miranda* rights," 451 U.S. at 487, they might have proceeded with the interrogation and secured the attorney only when they were finally prepared to formalize the "deal." In this manner, a suspect's Fifth Amendment right to counsel would soon come to depend on the police officer conducting the interrogation rather than upon the suspect's desire to invoke the constitutional right.

The need for a bright line rule is just as compelling where, as here, ambiguity in a suspect's request for counsel suggests uncer-

[28] It is irrelevant whether the NIS Agents genuinely believed that Davis' statement was ambiguous, for this Court has already adopted an objective standard for assessing a suspect's request for counsel: "[i]nterpretation is only required where the defendant's words, *understood as ordinary people would understand them*, are ambiguous." *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987).

tainty. As the Court observed in *Miranda*, a suspect who is uncertain about the nature of his rights, and how or whether to assert them, is most likely to be susceptible to badgering. *Miranda*, 384 U.S. at 471. In the absence of a rule requiring cessation of questioning after an ambiguous request for counsel, "the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith*, 469 U.S. at 98 (citing *Bradshaw*, 462 U.S. at 1044; *Michael C.*, 442 U.S. at 719). If anything, the likelihood of overreaching is greatest at the point when the suspect first decides to invoke the right to counsel.

The interrogator whose questioning is halted by a request for counsel, typically at the very point when the questioning becomes increasingly confrontational, J.A. 175; App. Ex. XL, is the interrogator most likely to badger a suspect out of invoking the right to counsel. After all, the reason for badgering is the desire to obtain a confession. Since the danger of impermissible badgering is significant, a *per se* rule must apply so that the "courts can be assured that coercion did not induce the waiver." *Arizona v. Roberson*, 486 U.S. 675, 689 (1988) (Kennedy, J., dissenting).[29] *See generally*, Charles J. Ogletree, *Are Confessions Really Good For The Soul? A Proposal To Mirandize Miranda*, 100 Harv. L. Rev. 1827 (1987).

In this regard, it makes no difference whether the police act in good faith. From the suspect's perspective, clarification is likely

[29] In Petitioner's situation, the risk of badgering was high. The very officers who were trying to secure statements through the interrogation had every incentive to badger him after he expressed a desire to consult with counsel just as the interrogation began to focus on the critical questions. *Cf. Roberson*, 486 U.S. at 690 (where "the danger of badgering is minimal, [the remote possibility is] insufficient to justify a rigid *per se* rule") (Kennedy, J., dissenting). Accordingly, a *per se* rule is appropriate in these circumstances.

to appear as badgering. Having been told that he or she has a right to counsel, a suspect who expresses a desire to consult with counsel and is then questioned about what he or she really means is likely to conclude that the police were insincere in telling him or her that there was a "right" to counsel. Since the clarification is likely to be seen not only as a hesitancy to fulfill the request, but also as an intention not to provide counsel at all, clarification only increases the coercive atmosphere.

2. The Potential For Abuse Requires A "Bright Line" Rule, The Benefits Of Which Outweigh Any Supposed Costs.

Just as the *Edwards* rule fosters judicial economy, a *per se* rule against further questioning would also "conserve[ ] judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implement[ ] the protections of *Miranda* in practical and straightforward terms." *Minnick*, 498 U.S. at 151. Thus, the benefits outweigh any perceived burdens:

> *Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis.

Michael C., 442 U.S. at 718. *See also Roberson*, 486 U.S. at 681-82.

A rule favoring the protection of a suspect's Fifth Amendment right to counsel is unlikely to have any appreciable costs for law

enforcement. Such claims were rejected when the Court first decided *Miranda*, and have been consistently rejected since then. *E.g.*, Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 456-60 (1987); Special Project, *Interrogations In New Haven: The Impact Of Miranda*, 76 Yale L.J. 1519 (1967).[30] Indeed, commentators have concluded that *Miranda* has done little, if anything, to impair the ability of police to obtain confessions: "[i]nterrogation warnings and waivers, after all, have been the centerpiece of the law of confessions for more than twenty years and have integrated themselves into the criminal justice process." Mark Berger, *Compromise And Continuity: Miranda Waivers, Confession Admissibility And The Retention Of The Interrogation Protections*, 49 U. Pitt. L. Rev. 1007, 1009 (1988). Thus, the *Miranda* doctrine is a "rule police not only can live with, but one which police can also use effectively to protect the admissibility of confessions." *Id.* at 1010. *See also Withrow v. Williams*, 507 U.S. ___, 113 S. Ct. 1745, 1755 (1993); *New York v. Quarles*, 467 U.S. 649, 663 (1984) (opinion of O'Connor, J.) (" 'meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures' ") (quoting *Innis*, 446 U.S. at 304 (Burger, C.J., concurring)); Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. at 455-57; Joseph D.

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[30] The government has suggested that providing an attorney would interfere with defendants' desires to unburden themselves by confessing. Opposition To *Certiorari* at 11-12. This same argument, however, could be used against *Miranda* warnings. Perhaps the government was simply trying to express a concern that a more protective application of *Miranda* would work to undermine the government's ability to obtain convictions. Again, a similar argument was made against *Miranda*, was rejected at the time, and has since been disproven through experience. The percentage of cases which result in guilty pleas remains high: 73 percent in the civilian federal system and 76 percent in the Navy and Marine Corps. *See* L. Ralph Mecham, *Report Of The Proceedings Of The Judicial Conference Of The United States Courts*: Annual Report Of The Director Of The Administrative Office Of The United States Courts at Table D-4 (1992); Letter from Chief Judge, Navy-Marine Corps Trial Judiciary to Navy Judge Advocate General (dated Dec. 11, 1992) Subject: Fiscal Year 1992, Fourth Quarter FY-92 Statistical Reports And Comparative Charts.

Grano, *Selling The Idea To Tell The Truth: The Professional Interrogator And Modern Confessions Law*, 84 Mich. L. Rev. 662 (1986). In short, the government's reluctance to provide lawyers to suspects who express their desire for counsel without precision is little more than thinly veiled dissatisfaction with the Fifth Amendment itself.

Miranda also placed the burden of proving a knowing and voluntary waiver squarely on the shoulders of the State: "[s]ince the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during the incommunicado interrogation, the burden is rightly on its shoulders." 384 U.S. at 475. This observation is particularly *appropos* here. The Agents elected not to record or videotape any part of this interrogation, or even to secure a second written waiver from Petitioner after his initial request for counsel, although they could have easily done so. J.A. 121-122; Tr. 297-298.[31] Since it had the opportunity to create a clear record, and deliberately chose not to do so, the government should not be given the windfall of any added ambiguity it created in the first place.[32]

The presence of an attorney will not only ensure that a suspect's waiver of his or her Fifth Amendment rights is knowing and voluntary, it may serve "subsidiary functions as well." *Miranda*, 384 U.S. at 470. For example, the presence of an attorney following an ambiguous request for counsel would save the courts from

[31] It is not necessary that police tape record all interrogations. Nonetheless, several police departments do record many interrogations. *E.g., California v. Prysock*, 453 U.S. 355 (1981); *Edwards*, 451 U.S. at 479; *Borg*, 918 F.2d at 1389, *cert. denied*, ___ U.S. ___ 112 S. Ct. 198 (1991). Such tape and video equipment was available to the Agents here but use of the equipment was not even considered. J.A. 121-22; Tr. 298.

[32] One commentator has recognized that "the subtle messages that can be communicated through changes in vocal inflection and nonverbal communication pose a formidable factfinding task. . . ." Welsh White, *Police Trickery In Inducing Confessions*, 127 U. Pa. L. Rev. 581, 586 (1979).

becoming involved in a morass of cases where the only critical issue concerns the language the suspect actually used in his ambiguous attempt to invoke counsel.[33]

C. Under Any Standard, The Government Has Not Shown A Knowing And Voluntary Waiver Of Petitioner's Right To Counsel.

Even if police officers were permitted to conduct the limited inquiry suggested by the government, Opposition To *Certiorari* at 10, Petitioner is still entitled to a new trial because the Agents' comments were not limited in this manner.[34]

In reviewing whether the government can show a knowing and voluntary waiver of a suspect's Fifth Amendment right to counsel, a court must consider the suspect's individual characteristics as part of the totality of circumstances. *Butler*, 441 U.S. at 374-75. Viewed in this manner, the impropriety of the Agents' comments after Petitioner's request was magnified by the distinctively coercive military setting in which it occurred. Further, Petitioner's psychiatric state, with which the Agents were familiar, made him more vulnerable to the Agents' improper questions. Thus, the

[33] There was such a factual dispute in this case. By adopting a clear standard, however, the Court can eliminate the need for such disputes over simple historical facts and facilitate appellate review. *See* Ogletree, 100 Harv. L. Rev. at 1843. *Cf.* Comment, *Pretext Searches and the Fourth Amendment*, 137 U. Pa. L. Rev. 1791, 1803 & n.66 (1989) (noting that "broad discretion and nebulous standards . . . frustrate appellate review").

[34] The government has not yet disclosed the manner in which it would propose to limit the inquiry. Presumably the interrogator would be permitted to ask no more than a few short and direct questions about the suspect's desire for counsel. For example, it may be proper in some cases for police to state: "You have a right to a lawyer. If you cannot afford one, a lawyer will be provided for you at no charge. The fact that you have requested a lawyer will not be held against you in any way. If you want a lawyer, we will stop questioning you and we will get you a lawyer. Would you like to talk to a lawyer?" That, however, is not what occurred here. Clarification should only be permitted where it is possible, but unlikely that a suspect is requesting counsel. Any clarification permitted must be simple, neutral, and reasonably designed to ascertain the suspect's intent. *See* James J. Tomcovicz, *Standards For Invocation And Waiver Of Counsel In Confession Contexts*, 71 Iowa L. Rev. 975 (1986).

government cannot show that Petitioner's statements were the product of a knowing and voluntary waiver.

1. The NIS Agents Did Not Limit Their Post-Request Questions In A Manner Calculated Only To Clarify Ambiguity In The Request.

The NIS Agents' first comments to Petitioner after his statement "[m]aybe I should talk to a lawyer" did little if anything to clarify his request. Rather than suggest that it was his right to consult with a lawyer, the NIS Agents changed the focus of the conversation to the appropriateness of their conduct in interrogating him: "[We] made it very clear that we're not here to violate his rights. . . ." J.A. 136; Tr. 310.[35] Although perhaps literally true, the statement was not balanced by the equally accurate and more appropriate warning that the Agents were not there to protect his rights either. Their comment was, at best, disingenuous, for their failure to administer the *Miranda* or Article 31(b) warnings prior to or during the October 20 interrogation demonstrates that these Agents were anything but guardians of Petitioner's constitutional rights.[36] *See United States v. Whitehead*, 26 M.J. 613 (A.C.M.R. 1988) (agent's statement to the effect that suspect had no need for attorney if he did nothing wrong was beyond permissible limit of clarification). As they knew or should have known, Petitioner could reasonably have construed the Agents' statements as suggesting that they were there to protect him. *Cf. Innis*, 446 U.S. at 301. This was patently misleading.

[35] Like a Freudian slip, the Agents' non-responsive statement suggests that the thought of violating Petitioner's constitutional rights was very present in their minds.

[36] The Court has granted *certiorari* where the question presented is whether a police officer's subjective belief that a person is not a suspect excuses the failure to provide the warnings required by *Miranda*. *Stansbury v. California*, ___ U.S. ___, 114 S. Ct. 380 (Nov. 1, 1993). Here, the NIS Agents should have provided Petitioner with Article 31(b) and *Miranda* warnings prior to the October 20 interrogation because *Miranda* did not countenance police deciding questions of waiver. 384 U.S. at 486 n.55.

By shifting the focus of the conversation away from Petitioner's right to counsel to the constitutionality of their conduct, the Agents did nothing to help him understand, much less exercise, his right to counsel. If anything, this misdirection suggested that the Agents' conduct was entirely proper and that they were protecting Petitioner's constitutional rights. Thus, one message sent by the interrogator's "clarification" was that Petitioner could "trust" the NIS Agents, a statement that was not only inaccurate in terms of their conflicting interests but went well beyond mere clarification.

This interpretation of the psychology running beneath the surface of the Agents' comments is consistent with this Court's analysis of similar interrogation techniques twenty-five years ago in *Miranda*:

> The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator.

384 U.S. at 453-54 (footnotes omitted).[37] In this regard, it is immaterial whether the NIS agents actually intended to use subtle interrogative techniques to undermine Petitioner's desire to invoke his right to counsel, for the focus of the constitutional inquiry is "primarily upon the perceptions of the suspect." *Innis*, 446 U.S. at

[37] It is also possible that Petitioner perceived the Agents' comments as a defensive response because they regarded his request as an accusation that they had been acting improperly. Since Petitioner may have been seeking the Agents' approval given their positions of authority, *see Miranda*, 384 U.S. at 454, it is natural that he would agree to withdraw his request in order to appease them.

301. In any event, the continued use of such psychological ploys[38] reinforces the need for a prophylactic rule.

Just as revealing as the innuendo contained in what the NIS Agents did tell Petitioner is what they did not say. Notably absent from their comments is *any* further advice about Petitioner's Fifth Amendment right to counsel. The Agents did not instruct Petitioner that there was nothing improper about his request for an attorney.[39] Nor did they make even the slightest effort to explain to Petitioner how he could actually obtain counsel.

In sum, the Agents' statements after Petitioner's request for counsel did nothing to clarify the request. Instead, their comments reinforced the coercive nature of the custodial interrogation and made it more difficult, rather than easier, for Petitioner to persist in his request for counsel. Since "any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege," *Miranda*, 384 U.S. at 476, the statements taken after the request for counsel should have been suppressed.

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[38] There is, even today, as great a need for the prophylaxis of *Miranda* as when the case was first decided. *E.g., Cooper v. Dupnik*, 924 F.2d 1520, 1523-24 & nn.1-2 (9th Cir. 1991) (holding that there was qualified immunity for civil rights claim, and discussing Tucson Police Department's policy to allow police officers to disregard, at their discretion, a suspect's request for counsel so that statements obtained may be used to impeach defendant who takes the stand or to prevent defendant from taking stand), *reversed*, 963 F.2d 1220, 1248 (9th Cir.) (*en banc*) (finding qualified immunity not available because departmental policy of violating settled principles of *Miranda* "shocks the conscience"), *cert. denied*, ___ U.S. ___, 113 S. Ct. 407 (1992).

[39] For example, the Agents could have instructed Petitioner that his silence or his desire to consult with an attorney could not be used against him in any manner. *See Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986); *Doyle v. Ohio*, 426 U.S. 610, 618 (1976); *Sizemore v. Fletcher*, 921 F.2d 667, 671-72 (6th Cir. 1990); *United States v. Hilstead*, 671 F.2d 950, 953 (5th Cir. 1982) (*per curiam*); *Washington v. Harris*, 650 F.2d 447, 454 (2d Cir. 1981), *cert. denied*, 455 U.S. 951 (1982).

2. The Inherently Coercive Military Environment In Which The Interrogation Took Place Further Undermined The Voluntariness Of Petitioner's Waiver Of His Right To Counsel.

As this Court has recognized, "the military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). *See also Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986).

Military society is vastly different than the civilian world. The commitment to individuality and individual rights which characterizes much of American society is largely absent in the military community. In its place is an equally strong commitment to conformity and to the requirements of the military unit over those of individual military personnel. Thus, "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Parker*, 417 U.S. at 760.

Nowhere is this divergent application of constitutional rights more evident than in the curtailment of the right of military personnel to freely express themselves. Thus, military personnel may be punished for such offenses as disrespect, UCMJ Articles 89, 91, 10 U.S.C. §§ 889, 891 and contempt toward officials, UCMJ Art. 88, 10 U.S.C. § 888. It is against this backdrop of submission to authority that the government evidently demands that military suspects assert their right to counsel with the same decisive vigor as civilians whose lives are not constrained by similar restraints on expression. Petitioner's training and experience within the military, and the very nature of the military itself, undermined his ability to invoke his right to counsel in a form clearer than "[m]aybe I should talk to a lawyer."

Consequently, the voluntariness *vel non* of Petitioner's waiver of his Fifth Amendment rights must be assessed within the military setting in which it occurred. The Court of Military Appeals has long recognized that the military environment creates unique impediments to a suspect's ability to invoke the right to counsel:

> Because of the effect of superior rank or official position upon one subject to military law, the mere asking of a question under certain circumstances is the equivalent of a command. A person subjected to these pressures may rightly be regarded as deprived of his freedom to answer or to remain silent.

United States v. Gibson, 3 C.M.A. 746, 752, 14 C.M.R. 164, 170 (1954). *See also United States v. Ravenel*, 26 M.J. 344, 349 (C.M.A. 1988); *United States v. Lewis*, 12 M.J. 205, 206 (C.M.A. 1982). As the Court of Military Appeals further explained:

> Conditioned to obey, a serviceperson asked for a statement about an offense may feel himself to be under a special obligation to make such a statement. Moreover, he may be especially amenable to saying anything his military superior wants him to say—whether it is true or not.

United States v. Armstrong, 9 M.J. 374, 378 (C.M.A. 1980).

These significant pressures were recognized as early as 1917: "[in] military cases, in view of the authority and influence of superior rank, confessions made by . . . [subordinates]" might not be truly voluntary, and either should not be admitted at all, or should be viewed with caution. A Manual For Courts-Martial, United States Army ¶ 225 (1917). Congress later acknowledged these coercive pressures to confess when it enacted the Elston Act, which made the use of such coercive measures "conduct [prejudicial to] good order and discipline," *i.e.*, a military offense. Article 24, Act of June 24, 1948, ch. 625, sec. 214, 41 Stat. 792.

Indeed, these subtle yet coercive pressures motivated Congress in 1951, to provide servicemembers with the Article 31(b) protections, which were then almost unknown in the civilian world. *See Armstrong*, 9 M.J. at 378 (citation omitted). *See also* Manuel E. F. Supervielle, *Article 31(b): Who Should Be Required To Give Warnings*, 123 Mil. L. Rev. 151, 181 (1989). Thus, the Court of Military Appeals has recognized that a servicemember's right to

counsel must be guarded in ways unnecessary for civilians because, from the first day of training and throughout his or her military career, a servicemember is trained "to respond almost unthinkingly to the wishes of a military superior" and even to fear court-martial for a failure to respond. *Ravenel*, 26 M.J. at 349 & n.3. It was for this reason that the Court of Military Appeals construed Article 31 as applying "in situations far more subtle than the custodial interrogation situation defined . . . in *Miranda*. . . ." *Id.* at 349 (citations omitted).

Petitioner was assigned to the guided missile destroyer U.S.S. MAHAN (DDG-42), a combat ship[40] whose mission demanded unhesitating submission to orders and respect for authority. Only one year out of basic training or "boot camp," Petitioner held the second lowest rank in the military; seaman apprentice. He was vulnerable to suggestion from the outset. When confronted by NIS Agents while handcuffed to a chair, and subjected to the coercive pressures of a military interrogation, he must have been overwhelm[illegible] Thus, his request for counsel must be viewed for what it was: as unequivocal an invocation of the Fifth Amendment right as could reasonably be expected.

3. Petitioner's Known Psychiatric Problems Further Suggest That He Was Particularly Susceptible To The Agents' Overreaching.

Also among the individual characteristics that must be considered in assessing the voluntariness of Petitioner's waiver of his right to counsel is his mental condition. *Colorado v. Connelly*, 479

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[40] The principal mission of a guided missile destroyer is to operate offensively and defensively against submarines and surface ships, and to take defensive actions against air attacks. It also provides gunfire support for amphibious assaults, and performs patrol, and search and rescue missions. Naval Orientation Manual, NAVEDTRA 16138-H (1991). In sum, Petitioner was a member of a "front line" unit where the need for strict discipline was high.

U.S. 157, 164-65 (1986).[41] The Agents did not take precautions to ensure that any statement obtained from Petitioner was the product of a knowing and voluntary waiver, although they were well aware of his mental and psychiatric deficiencies.[42] Instead, they took advantage of his uncertain psychiatric state.

Petitioner had been in custody when he was "arrested" by the NIS Agents, who placed him in handcuffs at the psychiatric ward as they took him to their stationhouse. J.A. 118; Tr. 295. The records that the NIS Agents had already obtained reflected that Petitioner had only received a high school equivalency certificate. Defense Ex. R. They also knew of his bizarre statements regarding killing someone. J.A. 19, Tr. 197. What they did not yet know when they interrogated him was that he had been suspended from his high school several times, and transferred to another from which he apparently withdrew prior to graduation. J.A. 185; App. Ex. LXIII numbers 1, 2, 11. Additionally, interviews at his former high school in Millersburg, Ohio, revealed that he had been chronically in trouble. One former teacher recalled Petitioner as "one of the ones you don't forget" because he made her feel uncomfortable and afraid. One example "typical" of his behavior was his use of a ball point pen to stab his hand until the entire desk was

[41] In *Connelly*, the Court held that "coercive police activity is a necessary predicate to the finding that a confession is not voluntary" and that the "deficient mental condition" of the suspect does not, without more, render a confession involuntary. 479 U.S. at 164, 167. The Court, however, held that mental condition was relevant to an individual's susceptibility to police coercion. *Id.* at 164-65.

[42] Petitioner's attending physician in the psychiatric ward was Doctor Sentell, the husband of the lead NIS Agent who conducted the interrogation. Article 32 Investigation transcript 120-21; J.A. 132, Tr. 306. In this regard, it is noteworthy that the hospital records contain the following notation:

> *Pt not to leave staff's eyesight ever! ! ! !*
>
> NO VISITORS ! !
>
> Unless screened by DOC Sentell

App. Ex. LXI (emphasis in original).

covered with blood. J.A. 184; App. Ex. LXIII. Further, the Agents knew that Petitioner had been detained in the psychiatric ward, and held essentially incommunicado without benefit of any hearing to challenge his detention.[43] Finally, Petitioner had been under constant watch, and was forced to wear red pajamas so that he was particularly visible. App. Ex. LXI, page 3.

When Petitioner said, after over an hour of interrogation in unfamiliar surroundings, [m]aybe I should talk to a lawyer," the Agents first response was that "[we] aren't hear to violate your rights." J.A. 136; Tr. 310. In this environment, it is hardly surprising that Petitioner, who had been diagnosed with "Ineffective individual coping skills. . . ." App. Ex. LXI at p.3, and an antisocial personality disorder, Pros. Ex. 63, did not invoke his right in clearer terms. While it is unclear whether the NIS Agents were responsible for the manner of Petitioner's detention, and although they were not to blame for his psychiatric condition before he was confined, they certainly took advantage of the situation. Given these facts, Petitioner's "request for counsel followed quickly by a waiver suggests confusion at best," rather than a knowing and voluntary waiver. *Maglio*, 580 F.2d at 206.

D. Remand Is The Appropriate Remedy.

This Court should remand to allow the lower courts to consider whether the government can show that the admission of the statements improperly taken from Petitioner were harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246 (1991). Although the government has argued in opposition to the *Certiorari* Petition that any error was harmless beyond a

[43] Because his confinement had been characterized as "medical," Petitioner had no right to immediate review of the detention as he would have had the detention been properly characterized as pretrial confinement. *Gerstein v. Pugh*, 420 U.S. 103 (1975). *See also United States v. Holloway*, ___ M.J. ___, No. 93-5010 (C.M.A. 1993); *United States v. Rexrote*, ___ M.J. ___, No. 93-5007 (C.M.A. 1993).

reasonable doubt, that claim should be considered, in the first instance, by the lower courts. *See Austin v. United States*, 509 U.S. ___, ___, 113 S. Ct. 2801, 2812 (1993) (where lower courts did not consider argument, "[p]rudence dictates that we allow the lower courts to consider that question in the first instance"); *Yee v. City of Escondido*, 503 U.S. ___, ___, 112 S. Ct. 1522, 1534 (1992); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. ___, ___, 111 S. Ct. 2419, 2437 (1991). Remand to the Navy-Marine Corps Court of Military Review is particularly appropriate in view of the plenary, *de novo* fact-finding powers of the Courts of Military Review. UCMJ Art. 66, 10 U.S.C. § 866. *See also United States v. Cole*, 31 M.J. 270 (C.M.A. 1990); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

Even if the Court undertakes a harmless error analysis, the government is unable to show that the error did not contribute to the verdict. *Fulminante*, 499 U.S. at ___, 111 S. Ct. at 1265; *Chapman v. California*, 386 U.S. 18, 24 (1967). Contrary to the government's argument that the evidence was "overwhelming[ ]," Opposition To *Certiorari* at 14, the verdict itself shows that the jury considered the case to be a close one. Although the government charged Petitioner with premeditated murder committed in the course of a robbery, the jury was unconvinced of premeditation and reached, in essence, a compromise verdict. Thus, the jury verdict, by itself, casts doubt on the harmlessness of the error.

The trial record further shows that a finding of harmless error is unjustified. The government lacked any eyewitness to the murder. Although there was evidence placing Petitioner at the Enlisted Club on the night of the murder, several hundred other sailors were also present. While circumstantial evidence of blood stains took up a large part of the government case, the type O spots of blood found on Petitioner's trousers and tennis shoes is shared by almost half of the world population. Tr. 907. Similarly, the government could not link the blood stain found on Petitioner's pool cue case to the victim since no positive blood type was established. Tr.

906. The linchpin of the government's case became Petitioner's supposed confession to Mull. The government's own evidence, however, undermined the reliability of Mull's report of Petitioner's alleged confession.

Mull's testimony about the statements allegedly made to him by Petitioner can be broken down into six "facts." J.A. 181, Tr. 747. Petitioner told Mull that: (1) he killed Shackleton by striking him with a pool cue over a $30 gambling debt;[44] (2) he then went to his girlfriend's house where he burned his clothes in the fireplace; (3) he thought he'd put one of his victim's eyes out, or at least had "messed [it] up pretty bad"; (4) he could not remove a blood stain on one of his cue sticks; (5) he and the victim had the same blood type; and (6) he had an alibi. At trial, the government's theory was that Petitioner had lied to Mull about an alibi, but had told the truth about killing Shackleton. In its attempt to corroborate this supposed confession to the murder, the government also disproved the remaining four "facts" in Petitioner's alleged confession to Mull.

For example, the government relied on the clothes Petitioner was wearing to link Petitioner to someone with type O blood, the blood type of the victim. Accordingly, the government abandoned Mull's testimony that Petitioner had burned his clothes.[45] Likewise, the autopsy photographs showed that there was no injury to Shackleton's eyes. This contradicted Mull's testimony that Petitioner "put out" the victim's eyes. Next, the government's expert

[44] The government's theory at trial overlooked why the murderer, whose intent it allegedly was to rob Shackleton, would have taken only $30 and left $205.63, Pros. Ex. 46, that was found in Shackleton's pocket. Tr. 562. The government's theory also rested on the questionable assumption that Shackleton was that rare breed of young enlisted sailor who, on payday after receiving $249, Pros. Ex. 24, would not spend more than $13.37 while drinking, gambling on pool games in a bar, playing golf, eating pizza, and taking a cab. Tr. 577, 578, 581, 591. (Shackleton starts with $249.00. The perpetrator takes $30.00 leaving $219.00. Thus, he spent only $13.37).

[45] Indeed, the government called Petitioner's girlfriend, who testified that she did not even have a fireplace. Tr. 1025.

chemist testified that there were no blood stains on Petitioner's pool cues, again refuting Mull's assertion that Petitioner was worried about such stains. Indeed, the government's reliance on blood stains turned on Petitioner and his alleged victim having different blood types. This again contradicted Petitioner's supposed confession to Mull.

In sum, the government's case presupposed, initially, that Petitioner had actually confessed to Mull. The government's theory further assumed that Petitioner's alleged statement that he had killed Shackleton was true, but that virtually everything else he had told Mull was false. The factual inconsistencies between the record and the supposed statement raise the question whether Petitioner actually told Mull anything. That Mull had reason to retaliate against Petitioner further undermines the reliability of the statement. Mull came forward with his evidence only as he himself was being interrogated after Petitioner alleged that Mull was running an unlawful money-lending operation. Indeed, Mull admitted that he knew that Petitioner had reported Mull's loansharking to the authorities before Mull related Petitioner's supposed admissions. Tr. at 764.

It is well-established that confessions "have always ranked high in the scale of incriminating evidence." *Brown v. Walker*, 161 U.S. 591, 596 (1896). *See also Bruton v. United States*, 391 U.S. 123, 135-36 (1968). The cornerstone of the government's case against Petitioner was the confession that he supposedly made to Mull. Yet Mull's reliability was a significant problem for the prosecution.

In reaching for some way to lend credibility to Mull's account, the government recognized the long-settled rule that the " 'reliability of a given witness may well be determinative of guilt or innocence.' " *Giglio v. United States*, 405 U.S. 150, 154 (1972) (*quoting Napue v. Illinois*, 360 U.S. 264, 269 (1959)). Thus, the government turned to Petitioner's illegally obtained statement to the effect that, if he had killed someone, he would have had to tell

someone. This statement was employed to bolster Mull's claim that Petitioner had confessed to him and made Mull's report of what might otherwise be viewed as empty and possibly delusional statements about the murder, (if the jurors believed the statements were made), appear more sinister than they otherwise would have. The government then exploited Petitioner's illegally obtained statement in its closing argument:

> Finally, the accused told NIS that if he had killed the guy, that if he had killed this guy, he would have to tell someone. In fact, he told several someones.

Tr. 1373. The government peppered its closing argument with references to the various instances where Petitioner "told multiple witnesses" and "admitted to the killing." Tr. 1363, 1375. The only arguable admission, however, was the alleged statement to Mull. J.A. 181; Tr. 747.

In short, harmless error analysis must contemplate that the government relied solely upon circumstantial evidence and Mull's report. This report, without more, was completely unreliable because it was contradicted on multiple salient points by other evidence. Without the validation of Petitioner's statement that he would have to tell someone if he had killed another, Mull's statement would have been ignored. Since that statement was the centerpiece of the government's case, the error was far from harmless; it was determinative.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court reverse the judgment of the Court of Military Appeals and remand for appropriate proceedings.

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